RE SITI HAMIDAH HAMAT
EX P K & N KENANGA BHD

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[BANKRUPTCY NO: 29-4011-98]
15 MAY 2002

BANKRUPTCY: *Notice - Notice of intention to oppose - Notice to oppose signed by judgment debtor's solicitor - Whether regular - Whether defective - Prescribed format in Form 16 - Whether only directory - Whether could be used with necessary modifications - Bankruptcy Rules 1969, rr. 4, 117*

The judgment debtor in this case had sought to oppose the petition issued by the judgment creditor and for the purpose filed a Form 16 Notice ('the notice') pursuant to r. 117 of the Bankruptcy Rules 1969 ('the Rules'). It was not in dispute that the notice was signed by the judgment debtor's solicitor and not by the judgment debtor personally, and that being so, the judgment creditor raised a preliminary objection to the notice arguing that it was not in conformity with the format of Form 16, and was hence defective. The learned senior assistant registrar however took the view that the judgment debtor's failure to sign the notice personally had not rendered the same bad in law, and in the event ruled that the notice valid and regular. Dissatisfied, the judgment creditor appealed.

Held:

[1] Rule 4 of the Rules provides that whenever the forms in the Appendix are adverted to, variations such as circumstances may require, may be permitted. It is thus fair to say that even though all laws are mandatory in the sense that they impose the duty of obedience on those who come within their purview, it does not follow that every slight departure therefrom shall taint the whole proceeding with a fatal blemish. (p 949 b-f)

[2] In matters of procedure, it is generally accepted that a statutory requirement may be interpreted as mandatory if it confers upon a litigant a substantial right, the violation of which will injure him or prejudice his case. On the other hand, a statutory provision regulating a matter of practice or procedure will generally be read as directory, whereby failure to strictly follow same will not materially prejudice a litigant's case or deprive him of a substantial right. (p 949 g-h)

[2a] It cannot be denied that the notice under r. 117 is the prescribed manner of alerting the petitioner of the judgment debtor's desire to oppose the creditor's petition in court. It cannot also be denied that no deprivation of substantial rights would result from the failure to follow the rigid words of Form 16, since the petitioner could still be satisfactorily alerted even without meticulously adhering to the prescribed format. In the circumstances, the format of Form 16 must be read as directory and not mandatory and it does not therefore matter who signed the notice. In any case, there is no basis to assert that the petitioner's interest is prejudiced by the fact that the notice was signed by an advocate and not by the judgment debtor personally. (p 950 a)

[3] The judgment debtor here was yet to be declared a bankrupt and thus there was no legal impediment that could justify the prevention of the judgment debtor permitting counsel to sign the impugned form. To deprive her of the rights to contest the petition merely on technical grounds is perverse to common sense and the administration of civil justice. (p 950 c)

[Preliminary objection rejected; appeal dismissed.]

Case(s) referred to:

Chin Sin Lan v. Delta Finance Bhd [2002] 1 CLJ 266 HC ***(not foll)***

Development & Commercial Bank Bhd v. Datuk Ong Kian Seng [1995] 3 CLJ 307 FC ***(dist)***

Kamaruddin Mohamed v. United Motor Works (M) Sdn Bhd [1982] 1 MLJ 126 ***(foll)***

United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2001] 2 CLJ 31 CA ***(refd)***

Legislation referred to:

Bankruptcy Rules 1969, rr. 4, 117

Rules of the High Court 1980, O. 56 r. 2

Other source(s) referred to:

Bhindras Interpretation of Statute, 7th edn, p 683

For the appellant - Taiyub Khan (Inderjit Singh); M/s B Inderjit Singh

For the respondent - M Kalaichelvan (Ashok K Raman); M/s Abu Talib Shahrom & Zahari

Reported by WA Sharif

JUDGMENT

Suriyadi Halim Omar J:

The judgment creditor had filed a creditor's petition against the judgment debtor, but before it could be heard the judgment debtor had filed a notice to oppose it, pursuant to r. 117 of the Bankruptcy Rules 1969. At the hearing date the judgment creditor had posed a preliminary objection alleging, that the notice, which was as per format 16, was defective, as it had been signed by the judgment debtor's solicitor, thus breaching a mandatory requirement. The judgment creditor had alleged that the judgment debtor must sign notice personally and nobody else. After hearing the preliminary objection the senior assistant registrar had rejected it, and hence the appeal before me. To reiterate, after due concession by the judgment creditor the only matter left for my consideration was the preliminary objection. At the end of the hearing I had no hesitation in dismissing the appeal with costs. I now supply my reasons for the dismissal.

In the course of the hearing, the case of *Development & Commercial Bank Berhad v. Datuk Ong Kian Seng @ Ong Kin Cheang* [1995] 3 CLJ 307 was brought to my attention by the judgment creditor, with particular reference to p. 314, where the Supreme Court remarked:

> ... rule 117 clearly provides that if a debtor intends to show cause against the petition, he shall file a notice in Form 16. We hasten to add that no breach of a mandatory rule can be described as a formal defect or an irregularity that can be cured.

Having scrutinised the above case, it was obvious that the crux of the matter under discussion was whether an affidavit affirmed by the judgment debtor, in opposition of the creditor's petition could substitute as a notice. As it were, no notice in the like of Form 16, provided for in the Rules of Bankruptcy 1969 was filed by the judgment debtor there. The Supreme Court without more, after hearing the arguments of the judgment debtor, had pronounced that an affidavit in opposition could not qualify as a notice when challenging the validity of the bankruptcy petition. As said above, the court further held that a failure to file a notice supported by an affidavit under r. 117, was not a mere defect that could be excused.

Having perused the case, I saw no reason to quarrel with the legal pronouncements, *inter alia*, that a notice was a mandatory requirement to be adhered by an aggrieved party, with the affidavit as a poor cousin to a Form 16 notice. I was also satisfied that at no time was the court confronted with

the legal poser of whether the format of Form 16 was mandatory in nature ie, rejecting any variation, and which also had to be signed personally by the judgment debtor, not by the debtor's solicitors.

In a gist, the facts in *Datuk Ong Kian Seng*'s case were distinguishable to the current one, in that here a notice in Form 16 was indeed lodged into court, in accordance with the requirements of r. 117 of the Bankruptcy Rules 1969. That being so, at no time thus was the relevant mandatory rule breached by the judgment debtor. Also, at no time was an affidavit adverted to, in substitution of the prescribed notice of Form 16. Thus the facts here were a far cry from the above case. What attracted the disaffection of the judgment creditor was that, even though a notice of opposition was indeed filed by the judgment debtor, that notice did not conform to the format of Form 16, in that it was signed by the latter's solicitor and not by herself personally. According to the judgment creditor, by virtue of the mandatory format, it was thus incumbent upon the judgment debtor to personally endorse the said notice to oppose. Since she had not adhered stringently to the format, the document thus had become defective, and invariably turning her opposition incompetent.

To augment the above Supreme Court's case, the judgment creditor industriously cited the case of *Chin Sin Lan v. Delta Finance Bhd* [2002] 1 CLJ 266 in which case the High Court there remarked:

> With regard to the first question, the said r. 117 clearly stipulates that "where a debtor intends to show cause against a petition he shall file a notice with the registrar ..." From the wording of the said rule it is clear to me that the **Form 16 must be made in the name of the debtor personally and not that of the advocate acting on his behalf.** Although the said notice appeared to have been filed substantially in the format of Form 16 but **in my view it is still not in conformity with the requirements of the said r. 117 as it was not issued in the name of the debtors personally.** (emphasis added).

Having perused pp. 272-274 (the relevant portion of this poser), it was with deep regret that I was unable to identify the premise of the above view, except for the phrase "from the wording of the said rule". As opposed to the brief reason, I was hard-pressed to consider certain incontrovertible factors as discussed below.

By analogy, in the event an appeal was anticipated, Parliament had promulgated under O. 56 r. 2 of the Rules of the High Court 1980 that Form 114 was to be alluded to. It was crystal clear even from a cursory reading of the provisions, that an appellant must allude to the correct format, due to it its elevated position. As compared to this scenario, r. 117 of the Bankruptcy Rules 1969 miserably failed to prescribe the format of the notice, in the event an aggrieved

party desired to oppose the petition. In a rather roundabout way, it is only in Form 16, even that in an oblique and passing manner that r. 117 is referred to.

Diluting further the supposed 'mandatory' format of Form 16, r. 4 of the Bankruptcy Rules 1969 in succinct terms provide:

> The forms in the Appendix, where applicable, and where they are not applicable, forms of the like character, with such variations as circumstances may require shall be used. Where such forms are applicable any costs occasioned by the use of any other or more prolix forms shall be borne by or disallowed to the party using the same unless the Court shall otherwise direct.

As regards the proforma of forms, Abdul Hamid FJ in *Kamaruddin bin Mohamed v. United Motor Works (M) Sdn. Bhd* [1982] 1 MLJ 126 at p. 128 in fact had occasion to opine:

> It needs no emphasis that they are recognised but it should be observed that proforma of forms to be used in bankruptcy proceedings is given in the appendix to the Bankruptcy Rules 1969 and be that as it may these forms are intended to be used with modifications as may be necessary.

Rule 4 surely, without requiring an in depth discourse of it, in all its clarity provides that whenever the forms in the Appendix are adverted to, variations as circumstances may require, may be permitted. Nothing is built into the said r. 4, which states that in the event a modified version is adverted to, that varied form may be construed as being defective or the intention of the notice be declared incompetent. Viewing the matter from a different angle, it is fair to say that even though all laws are mandatory in the sense that they impose the duty of obedience on those who come within their purview, it does not follow that every slight departure therefrom shall taint the whole proceeding with a fatal blemish.

In matters of procedure, it is generally accepted that a statutory requirement may be interpreted as mandatory if it confers upon a litigant a substantial right, the violation of which will injure him or prejudice his case. At the other end, a statutory provision regulating a matter of practice or procedure will generally be read as directory, when the disregard of it, or the failure to follow it exactly will not materially prejudice a litigant's case or deprive him of a substantial right (*Bhindra's Interpretation of Statute*, 7th edn). Applying the above universal view *vis-a-vis* the notice at hand as mandated by r. 117, it cannot be denied that it is the prescribed manner of alerting the petitioner of the judgment debtor's desire to oppose the creditor's petition in court, restricted to issues supplied in the relevant documentations. Does it matter who signs the

notice, so long as the judgment creditor has been alerted? With no deprivation of substantial rights or injury can result from ignoring the rigid words of Form 16, and the purpose of the legislature can still be accomplished ie, the petitioner satisfactorily alerted, without adhering meticulously to the prescribed format and substantially obtaining the same results, then the format of Form 16 must be read as directory and not mandatory. In the circumstances of the case, no petitioner would care to assert that his interest would be prejudiced, just because the notice was signed by an advocate and not by the judgment debtor personally.

I had to bear in mind too that under the Bankruptcy Act 1967, when a person is adjudged a bankrupt, his estate would vest on the official assignee. Thereafter any statutorily imposed dealings that are connected to the bankrupt person would require the prior official approval of the official assignee. In the current case, as the judgment debtor to be declared a bankrupt and thus status-wise no different to the next person, I found no legal impediment in existence that could justify the prevention of the judgment debtor permitting counsel to sign the impugned form. Members of the Honourable Society will rue the day when their signatures will be construed as not good enough to carry the day, when fulfilling their representative duty on behalf of their clients in like circumstances.

Additional to that, in the event the judgment debtor were to be prevented from giving notice of her intention to oppose the creditor's petition, the repercussion to her would be quite catastrophic, due to the quasi-criminal effect of a bankruptcy order. To deprive her of the rights to contest the creditor's petition, merely on technical grounds, surely would rebel against common sense and the administration of civil justice (*United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31). To wind up the matter, in a situation like this, without involving any new canon of construction the format must be strictly construed in favour of the person most aggrieved by the outcome.

At the end of the hearing I had no compunction in rejecting the preliminary objection of the judgment creditor with costs.